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Justice and the Felonious Attorney

Scott DeVito

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Scott DeVito, J.D., Ph.D.*

The Lawyer "stands 'as a shield' . . . in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.'"

– Justice Felix Frankfurter (Nov. 15, 1882 – Feb. 2, 1965)[1]

I. INTRODUCTION

A. *An Injustice*

On a bleary winter night, Lee Keller King, in a drunken rage, emptied his pistol into two men, nearly killing them.[2] At trial, he pled guilty to one count of attempted murder.[3] The Texas court initially sentenced King to seven years.[4] However, after four months in jail, the court recognized that the shooting was inconsistent with King's character, suspended his sentence, and placed him on probation.[5] In the

* S. DeVito, commercial litigation associate, Bonnett, Fairbourn, Friedman and Balint, P.C. I thank Justice Michael D. Ryan, James E. Barton II, and Karen E. Cummo for their insightful comments on previous drafts of this Article, as well as Bonnett, Fairbourn, Friedman and Balint for its support.

1. Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).
2. *In re* King, 136 P.3d 878, 880-81 (Ariz. 2006).
3. *Id.* at 881.
4. *Id.*
5. *See id.*; *see also id.* at n.3.

thirty years following the shooting, King lived a decent, ordinary life.[6] He was devoted to his family, attended church, went to law school, practiced law in Texas for ten years without a blemish, moved to Arizona, and applied for admission to the Arizona State Bar.[7] Nonetheless, in June 2006, the Arizona Supreme Court denied King's application for admission.[8] In doing so, the court perpetuated a serious injustice, an injustice mirrored by other state supreme courts.

B. The Injustice Explained

The court's decision was correct insofar as it denied King admission to the bar because he was not able to provide the kind of evidence necessary to establish that he had present good moral character.[9] Thus, on one level, justice was served.

On a deeper level, however, justice was not served. Prior to King's application, the Arizona Supreme Court had issued two opinions addressing the rights of persons with felony convictions to practice law in Arizona: *In re Arrotta*, 96 P.3d 213 (Ariz. 2004) and *In re Hamm*, 123 P.3d 652 (Ariz. 2005). The court's explanation of good moral character in those cases was misleading because the court explicitly adopted one standard while it utilized another.[10] Thus King was placed in the unenviable (and unjust) position of being required to prove his present good moral character using evidence to meet a standard different from that which the court used to evaluate his application.[11] This injustice was exacerbated by the King decision, *In re King*, 136 P.3d 878 (Ariz. 2006), when the court, once again, expressed one standard but used another.[12]

The problem is that the court only implicitly understands good moral character.[13] Philosophers have long recognized that moral character can be measured at two levels—the individual ("individual moral character") and the group ("group moral character").[14] Individual moral character is

6. *See id.* at 881.
7. *Id.*; *id.* at 887-88 (Hurwitz, J., dissenting).
8. *King*, 136 P.3d at 886.
9. *See infra* Part IV.C.
10. *See infra* Part IV.A-B.
11. *See infra* Part IV.C.iii-iv.
12. *See infra* Part IV.C.iii-iv.
13. *See infra* Part IV.
14. *See infra* Part III.

that (minimal) set of moral characteristics we expect of any person living within our society. Group moral character is a heightened set of moral characteristics necessary to be admitted to a particular group.

The Arizona Supreme Court implicitly recognizes this duality and uses both types to determine an applicant's moral character. Yet, because the court only implicitly recognizes this duality, it lacks the language or ability to express the true standard. As a result, the court explains denials of admission using the language of *individual* moral character even when it denies admission because of a lack of good *group* moral character.[15]

This misunderstanding creates an injustice by providing people who have a criminal past and aspire to the law with a misleading rule that effectively prevents them from producing the kind of evidence necessary to establish their current good moral character. This injustice is made all the more severe by the increasing number of Americans with felony convictions and by the disparate effects that trend has on non-whites and males.[16] Furthermore, the misunderstanding and the subsequent injustice occurs in bar admissions nationwide.[17]

C. Correcting the Injustice

This Article is intended to deepen courts' and admission committees' understanding of moral character and thereby to guide them to a more just and reasoned basis for determining whether persons with criminal pasts should be admitted to the bar.

To achieve this result, the Article will proceed in four parts. Part II is intended to inspire a change in understanding by showing the potential injustice of a misleading definition of moral character. Part III provides the court with support, drawn from three millennia of philosophical thought, showing that morality comes in two kinds: group and individual. Part IV uses a trilogy of Arizona decisions to demonstrate the problem in current decisions about good moral character and explains the actual test the

15. *See infra* Part IV.
16. *See infra* Part II.
17. *See infra* Part VI.

courts use in judging moral character. Finally, Part V shows that the confusion is widespread.

II. THE GROWING STAKES OF MISUNDERSTANDING MORAL CHARACTER

Applicants with criminal acts in their past often face a heightened burden of proof of good moral character. For example, in Arizona "[t]here shall be a presumption, rebuttable by clear and convincing evidence presented at an informal or formal hearing, that an applicant who has been convicted of a misdemeanor involving a serious crime or of any felony shall be denied admission."[18] Previously, Arizona required rebuttal by only a preponderance of the evidence.[19]

Furthermore, there is a rapidly growing percentage of Americans with criminal pasts. The number of prisoners held in federal and state prisons or local jails grew three times as fast as the U.S. population from 2004 to 2005.[20] More

18. ARIZ. R. SUP. CT. 36(b)(2) (West Supp. 2007). Similarly, in Connecticut, a felony conviction "creates a presumption of . . . lack of good moral character . . . ." REGULATIONS OF THE CONNECTICUT BAR EXAMINING COMMITTEE, ARTICLE VI-11 (2007) *available at* http://www.jud.state.ct.us/CBEC/regs.htm (follow "Article VI" hyperlink). A felony conviction is prima facie evidence of a lack of good moral character in Indiana. INDIANA RULES OF COURT, RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, RULE 12, SECTION 2 (2007) *available at* http://www.in.gov/judiciary/rules/ad_dis/index.html#r12. In Ohio, a person convicted of a felony "shall undergo a review by the Board of Commissioners on Character and Fitness" and can not be admitted unless (1) "more than five years have passed since the applicant was released from parole, probation, community control, post-release control, or prison if no post-release control or parole was maintained," (2) "the rights and privileges of the applicant that were forfeited by conviction have been restored by operation of law, expungement, or pardon," and (3) "the applicant is not disqualified by law from holding an office of public trust." RULES FOR THE GOVERNMENT OF THE BAR OF OHIO, RULE I, SECTION 11(D)(5)(a) (2007) *available at* http://www.sconet.state.oh.us/Rules/govbar/#rulei. Under Utah's rules, if an applicant has been convicted of a felony, then there is "[a] rebuttable presumption . . . against admission." JUDICIAL COUNCIL RULES OF JUDICIAL Administration, RULE 14-708(f)(3) *available at* http://www.utcourts.gov/resources/rules/ucja/14/07%20Admissions/USB14-708.html.

19. *In re* King, 136 P.3d 878, 882 (Ariz. 2006).

20. The numbers of prisoners held in federal and state prisons or local jails grew by 2.7% from 2004 to 2005. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 2005 2 (Nov. 2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf (last revised Jan. 18, 2007). The U.S. population grew by only 0.9% from 2004 to 2005. *See* U.S. CENSUS BUREAU POPULATION DIV., CUMULATIVE ESTIMATES OF POPULATION TABLE 2: CHANGE

broadly, in 1974, 1,819,000 people had ever served time in prison.[21] This nearly doubled to 3,437,000 people in 1991 and more than tripled to 5,618,000 people by 2001.[22] To put this in perspective, from 1974 to 2001, the U.S. population had grown from 213,853,928[23] to 284,796,887[24]—an increase of only 33%.

In addition, the U.S. prison population is not representative of the U.S. population in terms of race or gender. Black men are five times more likely than white men to spend some time in prison,[25] and men are ten times more likely to be imprisoned than women.[26]

Because of the higher burden of proof, confusion over what "good moral character" means (and how one shows it) will have a disparate and unfair effect on persons with a criminal past. In addition, non-whites and men will unfairly shoulder this burden. As such, justice requires that the courts clearly express what is required to show good moral character.

III. THE DEVELOPMENT OF WESTERN ETHICAL THOUGHT JUSTIFIES A DISTINCTION BETWEEN GROUP AND INDIVIDUAL MORALITY

For three thousand years, ethicists have recognized that a person's moral character can be judged at both the level of

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FOR THE UNITED STATES AND STATES, AND FOR PUERTO RICO AND STATE RANKINGS: APRIL 1, 2000 TO JULY 1, 2005 (Dec. 22, 2005), http://www.census.gov/popest/states/tables/NST-EST2005-02.xls; U.S. CENSUS BUREAU POPULATION DIV., CUMULATIVE ESTIMATES OF POPULATION TABLE 2: CHANGE FOR THE UNITED STATES AND STATES, AND FOR PUERTO RICO AND STATE RANKINGS: APRIL 1, 2000 TO JULY 1, 2004 (Dec. 22, 2004), http://www.census.gov/popest/states/tables/NST-EST2004-02.xls.

21. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, PRISON STATISTICS (2003), http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf.

22. *Id.*

23. U.S. CENSUS BUREAU POPULATION DIV., HISTORICAL NATIONAL POPULATION ESTIMATES: JULY 1, 1900 TO JULY 1, 1999 (Apr. 11, 2000), http://www.census.gov/popest/archives/1990s/popclockest.txt.

24. U.S. CENSUS BUREAU POPULATION DIV., TIME SERIES OF NATIONAL POPULATION ESTIMATES: APRIL 1, 2000 TO JULY 1, 2001 (Dec. 27, 2001), http://www.census.gov/popest/archives/2000s/vintage_2001/US-2001EST-01.html.

25. *See* U.S. DEP'T OF JUSTICE OFFICE OF JUSTICE PROGRAMS BUREAU OF JUSTICE STATISTICS, PRISON STATISTICS (2003), http://www.ojp.usdoj.gov/bjs/abstract/piusp01.pdf.

26. *See id.*

an individual and in the context of group membership. As such, there is a considerable basis for the courts to explicitly adopt a similar understanding of good moral character.[27]

A. The Ancient Greeks and the Movement From Group Morality to Universal Morality

Ancient Greek ethicists began the Western inquiry into moral character by attempting to measure the moral character of a person as a member of a particular group. For Homer, the classical Greek author of the *Iliad* and the *Odyssey*, [28] the principal type of moral character was group moral character.[29] For example, a person was "agathos" (" "), the ancestor of our word "good," if that person had the ideal qualities of a Homeric nobleman.[30] A person had "areté" (" "), roughly "virtue" or "excellence," when that person performed his or her "socially allotted function."[31]

Over time, the Greeks moved away from the morality of members of particular groups and reframed the question to how one measures the moral character of an individual as a member of the universal group—all persons. In the period following Homer, the Greeks began to interact more frequently with other cultures.[32] As a result, the Greeks struggled to reconcile their idea of a *universal* moral code with the existence of many different *local* moral codes.[33] This required Greek ethicists to shift from a focus on group

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27. As noted above, individual moral character is the type of moral character we expect of everyday people while group moral character is a heightened set of moral characteristics expected of a person to join a particular group. It is the premise of this law review that one can have individual moral character while lacking group moral character. I have been asked whether the converse is true: Can you have group moral character without individual moral character? Assuming that what it takes to have group moral character is determined by the group as opposed to society at large (whether this is true is outside of the scope of this Article), then yes. For example, a scientist might perform research in a manner consistent with the highest moral ideals of the profession but be an abusive parent.

28. HOMER, THE ILIAD OF HOMER (Richmond Lattimore trans., The University of Chicago Press 1951); HOMER, THE ODYSSEY OF HOMER (Richmond Lattimore trans., Harper & Row 1975) (1965).

29. *See* ALASDAIR MACINTYRE, A SHORT HISTORY OF ETHICS 5 (2d ed. 1998).

30. *Id.* at 5-6.

31. *Id.* at 7-8.

32. *See id.* at 8-11.

33. *Id.* at 9-11.

morality to individual morality.[34]

For example, Plato believed that a person was virtuous when that person's soul was just.[35] Plato believed that the soul had three parts: the rational (reason), the spirited (feelings of anger, honor, and ambition), and the appetites (desire for food, drink, and sex).[36] For the soul to be just, each part had to be performing its function and the three parts had to be in balance (functioning harmoniously).[37] Similarly, Plato believed that the polis ("π") or city-state could be virtuous. The polis consisted of three groups: rulers (who had the virtue wisdom), guardians/warriors (who had the virtue courage), and artisans/tradespeople (who had virtues that best suited them to their art or trade).[38] The polis was virtuous when each of these three parts performed its function and did so harmoniously.[39] Thus, a person could be just or virtuous when that person's soul was in harmony (individual character) and when that person was acting as member of his or her group in the polis (group character).

Aristotle also believed that people were virtuous on two levels. For example, Aristotle begins the *Nicomachean Ethics* by stating "that ethics is a department of the theory of politics"[40] and ends the *Nicomachean Ethics* by stating that we can now begin our study of politics.[41] For Aristotle, the

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34. *See id.* at 9 ("Thus evaluative predicates come to refer to dispositions to behave in certain ways relatively independent of social function.").

35. ROBERT L. HOLMES, BASIC MORAL PHILOSOPHY 65 (1993); PLATO, *Republic*, *in* PLATO: THE COLLECTED DIALOGUES 684-85, 814 (Edith Hamilton & Huntington Cairns eds., Paul Shorey trans., Princeton University Press 1961).

36. HOLMES, *supra* note 35, at 66; PLATO, *supra* note 35, at 677-83.

37. HOLMES, *supra* note 35, at 66; PLATO, *supra* note 35, at 814 ("Then when the entire soul accepts the guidance of the wisdom-loving part and is not filled with inner dissension, the result for each part is that it in all other respects keeps to its own tasks and is just . . . .").

38. HOLMES, *supra* note 35, at 65; PLATO, *supra* note 35, at 616-22, 671.

39. PLATO, *supra* note 35, at 683-84 ("But we surely cannot have forgotten this, that the state was just by reason of each of the three classes found in it fulfilling its own function.").

40. J. O. URMSON, ARISTOTLE'S ETHICS 109 (Basil Blackwell Ltd. 1988); ARISTOTLE, *Ethica Nicomachea*, *in* THE BASIC WORKS OF ARISTOTLE 1112 (Richard McKeon ed., W.D. Ross trans., Random House 1941) ("Now our predecessors have left the subject of legislation to us unexamined; it is perhaps best, therefore, that we should ourselves study it, and in general study the question of the constitution, in order to complete to the best of our ability our philosophy of human nature.").

41. URMSON, *supra* note 40, at 109; ARISTOTLE, *supra* note 40, at 1127 ("Every state is a community of some kind, and every community is established

central difference between ethics and politics is that each looks at a different aspect of man. In ethics we look at man *qua* man (or individual) while in politics we look at man *qua* citizen (or member of the group).[42]

Following the death of Aristotle, Greek moral theory continued its movement toward a focus on the individual in the context of the universal group. This period, the Hellenistic period,[43] arose as a result of the empire building of Alexander the Great which caused the relatively small polis to be overshadowed by the vast empire.[44] As a result of this shift of control from the local to the distant, the role of the individual rose in prominence[45] while group membership decreased in importance.[46]

B. Modern Ethicists and the Movement Toward the Universal Individual

Modern ethicists completed this transformation by expressing morality in terms of the anonymous, idealized individual in relation to the anonymous, idealized and universal group.

For example, according to Kant, each individual should "[a]ct only according to that maxim by which you can at the same time will that it should become a universal law."[47] A

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with a view to some good; for mankind always act in order to obtain that which they think good. But, if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good.")

42. *See id.*

43. The Hellenistic Age lasted, approximately, from the death of Aristotle in 322 B.C. to 31 B.C. 1 A. A. LONG & D. N. SEDLEY, THE HELLENISTIC PHILOSOPHERS xi, 2 (1987).

44. *See* MACINTYRE, *supra* note 29, at 100.

45. *Id.* at 100-01 (noting that "[i]ndependence and self-sufficiency become . . . the supreme values").

46. *See id.* at 100-03. For example, "Epicurus was perhaps the first philosopher who made a clear, if implicit, distinction between justice as the virtue of an individual and the justice of societies or legal order." GISELA STRIKER, ESSAYS ON HELLENISTIC EPISTEMOLOGY AND ETHICS 177-78 (Cambridge University Press 1996) (also noting that "this first attempt to separate questions about virtue from questions about social justice did not lead to an extended debate about the foundations of morality. The first installment of that debate, which continues to this day, seems to have occurred in the second century B.C.").

47. HOLMES, *supra* note 35, at 142; IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 69-71 (H.J. Patton trans., Harper Torchbooks 1964) (1948).

maxim is a rule that underlies an action.[48] Thus, the only acts that are morally permissible are those acts for which it would be rational to want everyone to follow the rule underlying the act: if, in order to achieve your goals, you would need to make an exception from that universal rule for yourself, then the act is not morally permissible.[49] In essence, an individual should ignore his personality and imagine what a truly rational individual—an anonymous, idealized member of the anonymous, idealized, universal group—would do.[50]

Similarly, according to rule utilitarianism "[a]n act is right if it accords with a rule the general following of which produces as great a balance of good over bad for all people affected as any alternative rule."[51] Once again, we cannot make a moral judgment without looking to the universal group: all people.[52] At the same time, the particular individual has been replaced by the universalized individual[53] because we count everyone's good or evil (pleasure or pain).[54]

C. A Three Thousand Year History of Two Types of Moral Character

From the ancient Greeks to the modern period, ethicists

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48. See HOLMES, *supra* note 35, at 140-142; *see also* KANT, *supra* note 47, at 68-69 n.*, 88 n.*. For example, if I am rational, then if I steal bread because I am hungry, I should believe the rule that it is acceptable for people to steal bread when they are hungry.

49. *See* KANT, *supra* note 47, at 91-92.

50. See KANT, *supra* note 47, at 95 ("Ends that a rational being adopts arbitrarily as effects of his action (material ends) are in every case only relative; for it is solely their relation to special characteristics in the subject's power of appetition which gives them their value. Hence this value can provide no universal principles, no principles valid and necessary for all rational beings and also for every volition—that is, no practical laws."). To determine what this idealized member of the universal group should do, the person must think about what would happen if all the (idealized) members of that universal group did what that person wanted to do. *Id.* at 101 ("A rational being belongs to the kingdom of ends as a *member*, when, although he makes its universal laws, he is also himself subject of these laws. He belongs to it as its *head*, when as the maker of laws he is himself subject to the will of no other.").

51. HOLMES, *supra* note 35, at 164 (quoting JOHN DEWEY, THE LATER WORKS, 1925-1953 280 (Jo Ann Boydston ed., SIU Press 1985).

52. JOHN STUART MILL, *Utilitarianism*, *in* ON LIBERTY AND OTHER ESSAYS 142 (John Gray ed., Oxford University Press 1991) (noting "that [the] standard is not the agent's own greatest happiness, but the greatest amount of happiness altogether").

53. *See id.* at 142; *see also* HOLMES, *supra* note 35, at 156-57.

54. *Id.* at 137 (noting that good and evil correspond to pleasure and pain).

have recognized that a person's moral character can be measured either at the individual or at the group level. Consequently, there is a three thousand year long basis for the court to do the same.

IV. A TRILOGY OF ARIZONA CASES ON MORAL CHARACTER

Arizona's recent trilogy of cases discussing moral character in the context of applications for admission to the bar by persons with felony convictions[55] demonstrates the court's implicit recognition of group and individual moral character, its use of group moral character in assessing applications, its measure of good group moral character, and its misleading explanation for its holdings.

A. The Arrotta *Test—Setting the Stage for Confusion*

Arrotta illegally charged the parents of a child who died from a vaccination a one-third contingency fee, while simultaneously receiving payment for those services under the Childhood Vaccine Act, 42 U.S.C. §§ 300aa-1 to 300aa-34 (1986).[56] He also illegally paid a claims adjuster in Arizona's risk management section over $400,000 for providing him with confidential information about claims against the State.[57] In the end, Arrotta pled guilty to mail fraud, bribery, fraudulent schemes and practices, and disclosure of confidential information;[58] he consented to disbarment and served one year in prison.[59]

Eight years after his disbarment, Arrotta was denied reinstatement.[60] In denying Arrotta reinstatement, the court held that to be reinstated a disbarred attorney must show (1) present good moral character, (2) knowledge of the law, and (3) rehabilitation.[61] Ignoring the first two requirements, the court focused its discussion on the rehabilitation prong and concluded that Arrotta had not demonstrated rehabilitation.[62]

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55. *In re* Arrotta, 96 P.3d 213 (Ariz. 2004), *In re* Hamm, 123 P.3d 652 (Ariz. 2005), *cert. denied,* 126 S. Ct. 2300 (2006), and *In re* King, 136 P.3d 878 (Ariz. 2006).

56. *Arrotta*, 96 P.3d at 214.

57. *Id.* at 215.

58. *Id.* at 216.

59. *Id.*

60. *Id.* at 216, 220.

61. *Id.* at 216.

62. *See Arrotta*, 96 P.3d at 216-20.

While *Arrotta* does not directly address good moral character, its discussion of rehabilitation shows the court's implicit acceptance of the duality of moral character, its implicit understanding that group moral character counts, and its over-reliance on individual moral character.

The court noted that a requirement of showing rehabilitation is more than what is required of first-time applicants to the bar.[63] By explaining the additional requirement, the court demonstrated an implicit understanding that lawyers are members of a group that imposes moral requirements on its members because of their special place, power, and role in society.[64] For example, the court recognized that a disbarred attorney "has . . . seriously violated the trust placed in him as an officer of the court."[65] In addition, Arrotta "has revealed that, at least in some circumstances, he poses a threat to members of the public."[66] Furthermore, the court stated that "[w]e must endeavor to make certain that [we do] not again put into the hands of an unworthy petitioner that almost unlimited opportunity to inflict wrongs upon society possessed by a practicing lawyer."[67]

Two points about good moral character underlie this discussion. First, the court recognized that a lawyer's special place in society gives the lawyer special power but with that special power comes heightened moral requirements. Second, the court applied this heightened moral character to itself.[68]

While the court clearly understood that lawyers have special group moral qualifications, it quickly shifted away from group morality to individual morality by placing a single requirement on Arrotta for readmission—that he show rehabilitation.[69] Such a showing required Arrotta to demonstrate that he had identified the weaknesses causing his prior bad behavior and that he had overcome those

63. *Id.* at 216.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* (alteration in original) (citing *In re* Piers, 561 N.W.2d 297, 300 (S.D. 1997)).
68. Each of these points is an unconscious recognition of group moral character.
69. *See, e.g.*, *Arrotta*, 96 P.3d at 217.

weaknesses.[70]

This is a shift from group moral character to individual moral character because Arrotta only has to show that he has overcome his individual problems. He does not need to show that he meets the heightened moral qualifications for membership in the group (including the very requirements the court applies to itself) because the court has conflated rehabilitation with individual moral character and individual moral character with group moral character. While this lowers the bar for Arrotta,[71] it lays the groundwork for confusion.

B. Hamm—*Solidifying the Confusion*

At the age of twenty-six, Hamm participated in the murder of two men who sought to buy a large quantity of marijuana from Hamm and his accomplices.[72] Hamm was arrested, "pled guilty to one count of first-degree murder and was sentenced to life in prison, with no possibility of parole for twenty-five years."[73]

During his incarceration, Hamm underwent a remarkable change. He was a model prisoner who "completed certificates in yoga and meditation, . . . helped fellow inmates learn to read and write and to take responsibility for their actions [and] . . . obtained a bachelor's degree in applied sociology, *summa cum laude*, from Northern Arizona University."[74] While in prison he married and, with his wife, founded a "prison and prisoner family advocacy organization."[75] Hamm was released from prison on parole in 1992 and received an absolute discharge in December 2001.[76] In addition,

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70. *See, e.g., id.*

71. Shortly after the decision was published, Arrotta returned with evidence that he had identified his weaknesses and overcame them. *See* Dwight M. Whitley, Jr. Hearing Officer 91, *Hearing Officer Report & Recommendation* 1-13 (Oct. 14, 2003) (discussing Arrotta's evidence); Disciplinary Commission of the Supreme Court of Arizona, *Disciplinary Commission Report* 1-2 (2004) (recommending that Arrotta be admitted). As a result, he was reinstated. Arizona Supreme Court, *Order of Reinstatement* (2005).

72. *In re* Hamm, 123 P.3d 652, 654 (Ariz. 2005), *cert. denied,* 126 S. Ct. 2300 (2006).

73. *Id.* at 654-55.

74. *Id.* at 655.

75. *Id.*

76. *Id.*

> [b]etween his release in August 1992 and his absolute discharge in December 2001, Hamm performed thousands of hours of community service. He advocated for prisoners' rights in various forums by writing position papers, appearing on radio programs, testifying in legislative hearings, and speaking at churches, schools, and civic organizations. He also appeared in a public service video encouraging children not to do drugs or join gangs.[77]

Finally, Hamm graduated from Arizona State University College of Law in 1999 and passed the Arizona Bar Examination in 2004.[78]

Given these basic facts, Hamm appeared to be the poster-child for rehabilitation and, given the *Arrotta* opinion, it seemed likely that the court would admit Hamm to the bar. Yet, the court denied Hamm admission.[79] It did so by shifting the focus away from rehabilitation (which Hamm must show) to good moral character (which Hamm must show "independent of and in addition to" rehabilitation).[80]

In making this shift, the court once again failed to distinguish between good group moral character and good individual character. Instead, it found that Hamm lacked "present good moral character" because of "Hamm's lack of candor before the Committee and this Court, his failure to accept full responsibility for his serious criminal misconduct, and his failure to accept or fulfill, on a timely basis, his parental obligation of support for his son."[81] In essence, the court lumped all of Hamm's character flaws together under the generic label of "moral character."

This is a mistake. Some of this evidence of Hamm's character flaws is best described as falling under individual moral character while other character flaws are better understood as falling under group moral character. For example, Hamm's failure to fulfill child support obligations[82] and his failure to accept full responsibility for his criminal misconduct[83] are evidence of personal failings or of a lack of

77. *Id.*
78. *Hamm*, 123 P.3d at 655.
79. *Id.* at 662.
80. *Id.* at 659.
81. *Id.* at 662.
82. *Id.* at 659-60.
83. *Id.* at 658.

individual moral character. On the other hand, Hamm's special knowledge of the law and special status as a person seeking to join the bar make his failure to investigate his legal obligations to pay child support,[84] his failure to report a domestic disturbance on his character and fitness report,[85] and his plagiarism in his pleadings to the court (and lack of candor about this plagiarism)[86] failings of group moral character.

In addition, conflating these different types of moral failings is a mistake the court should have recognized. For example, the court noted the importance of Hamm's duty of candor to the Committee on Character and Fitness,[87] as well as his special knowledge of the law and the duties that arise from it.[88] These duties only make sense within the context of group moral character. To lump them together with personal duties is a category mistake.

At the same time, the court hinted at what it takes for a person with criminal acts in his or her past to show good group moral character. That person must make "an extraordinary showing of present good moral character."[89]

C. In re King—*The Bitter Fruit of Confusion*

While the court's conflation of group and individual moral character was "harmless" in Hamm's case because the evidence indicated that Hamm lacked both good individual and good group moral character, this confusion produced bitter fruit in *In re King*.

1. *King Nearly Kills Two Men and is Denied Admission to the Bar*

In 1977, after a day of heavy drinking, King shot and gravely injured two men.[90] He pled guilty to one count of attempted murder,[91] was initially sentenced to seven years,

84. *Hamm*, 123 P.3d at 659, n.7.
85. *Id.* at 661.
86. *Id.*
87. *Id.* at 660-61.
88. *Id.*
89. *Id.* at 659.
90. *In re* King, 136 P.3d 878, 880 (Ariz. 2006).
91. *Id.* at 881.

but was given "shock probation"[92] after serving four months in prison.[93]

Like Hamm, King's life took a turn for the better after he was arrested. During his probationary period, "King underwent mental health counseling and group therapy."[94] King eventually entered law school, passed the Texas bar exam, was admitted to the Texas state bar, and practiced for ten years without a blemish on his record.[95]

In 2003, King moved to Arizona[96] and passed the Arizona bar exam.[97] King's initial petition for admission was denied by the Committee on Character and Fitness,[98] although the Committee eventually recommended his admission.[99] Nonetheless, the Arizona Supreme Court denied King admission.

2. King Has Present Good Individual Moral Character

In the context of King's life after being released from prison, this was a surprising outcome. The court stated that King

> appears to have been a model citizen in the almost thirty years following his crime. He is a devoted family man, happily married and successfully raising three children. He is active in his children's Boy Scout groups and the Chandler Christian Church, where he is involved with a number of leadership groups and charitable programs. He was similarly active in his church in Texas for an extended period of time.[100]

In addition, King appears to have had no skirmishes with the law during the thirty years following his first arrest.[101] His application was supported by fifty letters including letters from "peers, colleagues, supervisors, friends, clients, professors, clergymen, judges, and lawyers" each noting his

92. *Id.* at 881 n.3 ("The purpose of [which] was to stun the probationer with the harsh realities of imprisonment, then release the probationer into society with a strong impression of the consequences of crime.").
93. *Id.* at 881.
94. *Id.*
95. *Id.*
96. *King*, 136 P.3d at 881.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 887-88 (Hurwitz, J., dissenting).
101. *Id.*

good moral character.[102]

Thus, on the evidence presented, King demonstrated good *individual* moral character. But that is the problem: this evidence does not demonstrate King's good *group* moral character.

3. *The Court Claims to Reject King's Application Because of a Lack of Evidence of Good Individual Moral Character*

While the court implicitly recognized that King had presented only evidence of individual moral character, it failed to make clear that it rejected him on the basis of a lack of evidence of good group moral character. Instead, the court focused on showing that King lacked individual moral character. As discussed below, in the process, the decision appears internally inconsistent and the Court appears to be grasping at straws to defend denying King admission.

The court's first internal inconsistency arises in its discussion of whether King had taken responsibility for his crime. One the one hand, the court concluded that he had not.[103] It did so by interpreting King's applications to law school, the Arizona bar, and to the court as minimizing his personal responsibility for the shootings: in these documents King explains why he accepted a plea of guilty rather than fight the charge.[104] The court went so far as to state that "King expressed no remorse" to the court.[105] In addition, the court refused to take King's attempt at suicide, almost immediately after the shootings, and guilty plea as evidence of taking responsibility for the shootings on the ground that the evidence suggested "King was as remorseful about being caught as for shooting the victims."[106]

On the other hand, the court recognized King's acceptance of responsibility and remorse by stating, "in both hearings before the Committee, King admitted shooting the victims and expressed remorse, calling the shootings 'a mistake I made that I will carry with me for the rest of my

102. *King*, 136 P.3d at 888 (Hurwitz, J., dissenting).
103. *Id.* at 884.
104. *Id.* at 883-84.
105. *Id.*
106. *Id.* at 883 n.10.

life.'"[107] Furthermore the court noted that "King demonstrated his acceptance [of responsibility] by informing judges, lawyers, law professors, former employers, and a host of friends, acquaintances, and colleagues of his crime over an extended period of time, impressing upon many of them heartfelt feelings of remorse."[108]

Thus, the court believes both that King has failed to take responsibility for his crimes and that he has accepted such responsibility. This is both internally inconsistent and nonsensical. Moreover, it can best be understood as the court's effort to search for an explanation as to why it rejected King despite the fact that it either did not understand, or was not willing to admit, the true reasons for the rejection.

The second internal inconsistency arises in the court's discussion of King's failure to remember the events surrounding the shooting. Here, the court took King's failed recollection of the events surrounding the shooting as "suggest[ing that] he has not candidly assessed his actions on the morning of the shootings."[109] Failing to candidly assess one's actions when they lead to tragic results would certainly demonstrate a serious lack of individual character. However, the evidence before the court demonstrated that King was highly intoxicated at the time of the shootings.[110] King admitted this and explained that he did not recall with any accuracy anything that happened that evening.[111] While blacking out or having decreased memory due to intoxication implies a lack of restraint at the time, stating that you do not remember something when you have a lapse of memory is not a failure of candor. Once again, despite recognizing that King failed to remember the events of that night, the court held that he lacked candor about those same events. Once again, this finding is internally inconsistent. As a result, we see the court grasping at straws because it does not understand how to explain why it must reject King.

The court's arguments that King failed to identify the

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107. *Id.* at 883.

108. *King*, 136 P.3d at 883.

109. *Id.* at 884.

110. *Id.* at 890 (Hurwitz, J., dissenting) (noting that "[t]he arrest report makes clear that when apprehended, Mr. King was intoxicated to the point of incapacitation; he was so incoherent that the police officers were unable to read King his *Miranda* rights").

111. *Id.* at 880 n.2 (majority opinion); *see also id.* at 884.

weaknesses that caused his crime[112] and to provide evidence of overcoming those weaknesses[113] have precisely the same problem—internally inconsistent arguments about individual moral character and the appearance of grasping at straws to justify rejecting King.

4. *The Court Actually Rejects King's Application Because of a Lack of Evidence of Good Group Moral Character*

The court's arguments relating to individual character all fail because in trying to reject King by saying that he is a bad individual, the court tries to say something it intuitively knows to be false. The court must resort to these arguments because it knows that it must reject King but lacks the language to express the true explanation for this rejection—that King has failed to demonstrate evidence of good group moral character.[114]

The implicit importance of good group moral character to the court made itself known at various points in the decision. For example, the court noted that at the time of the shooting, "King was a certified peace officer, employed as a reserve deputy constable."[115] The fact that a certified peace officer would violate his duties as a police officer by shooting two men was an important indication to the court that King lacked the kind of moral character necessary to be a peace officer,[116] in essence, that King lacked, at least, one kind of good group moral character. In addition, the court's reference

112. *Id.* at 884-85.

113. *Id.* at 885-86. A particularly problematic argument of the Court is that King, for whom there is no evidence of alcohol addiction, failed to complete an alcoholism program. *Id.* at 886. In addition, the Court considers Mr. King's moderate use of alcohol (to no ill effect) during the thirty years after the shootings to be troubling. *Id.* at 886.

114. Given the *Arrotta* and *Hamm* decisions, King really had no way to know that he needed to show good group moral character or even what would count as good group moral character. *See supra* Part IV A-B.

115. *King*, 136 P.3d at 880.

116. *See id.* at 882-83 (noting that "King inflicted serious injuries upon [the victims] while holding a position of public trust as a peace officer"); *see also id.* at 880-81 (noting King's "numerous hours of basic training," "patrol duties with full-time officer," duties serving civil court papers, being "'passed over' for a full-time deputy constable position," use of "his semi-automatic service revolver," that he was off-duty at the time of the shooting, and that there is some evidence King was suspended at the time).

to two cases holding that law enforcement officers and law school graduates are held to higher moral standards indicates that it is King's failure to meet these higher group moral standards that lies at the heart of the court's rejection of his application,[117] as does the court's recognition that "King committed his crime *while occupying a position of public trust*."[118]

Furthermore, the court focused on (what it believed to be) King's lack of candor on his law school application, on his application to the bar, and to the court.[119] The court's emphasis on this lack of candor[120] demonstrates both that the court recognized the need for applicants to a group to be candid with the group's gatekeepers and that the court itself was such a gatekeeper. [121] A failure to be candid with those gatekeepers indicates that the applicant believes that if the facts were known, the gatekeepers would find the applicant lacking the moral qualifications necessary to join the group.

Because the court failed to show that King lacks good individual character and consistently referred to group moral character, we can only conclude that the court rejected King because he did not present evidence of good group moral character—despite the court's own failure to understand that it was doing so.

V. MEASURING GOOD GROUP MORAL CHARACTER

As we have seen, the *King* decision, despite the court's arguments to the contrary, can only be understood as refusing King admission to the bar because he lacked good group moral character. Once we recognize this, we can uncover the court's test for such character.

Our first clue is provided when the court noted that the worse the crime committed, the higher the burden on the applicant to prove moral character.[122] In essence, the test of

117. *See id.* at 882-83 (citing Barlow v. Blackburn, 798 P.2d 1360, 1366 (Ariz. Ct. App. 1990) and Seide v. Comm. of Bar Exam'rs, 782 P.2d 602, 604 (Cal. 1989)).

118. *Id.* at 882 n.9 (emphasis added).

119. *Id.* at 883-84.

120. *Id.*

121. *See King*, 136 P.3d at 885.

122. *Id.* at 882-83 (holding that "[t]he weight of the added burden of demonstrating complete rehabilitation is determined by the gravity of the past criminal conduct").

good group moral character is a balancing test.[123] Once a person does something bad (e.g., commits a crime), that person has put something on one side of the scale. To overcome that bad act, the applicant must then put something good on the other side of the scale.

King appeared to have done the latter, by having lived a perfectly decent, ordinary life. But the court noted that everyone is expected to live an ordinary life and that doing so does not counter-balance a previous (serious) bad act.[124] Therefore, to counter-balance his attempted murder conviction, King would have had to engage in some set of affirmative, purposeful, positive acts, beyond those associated with living a normal life, to offset the negative acts in his past.[125]

It is noteworthy that this is more than what we require of people who have committed crimes to show that they are perfectly decent individuals. Living thirty crime-free years, being a good parent, adopting your spouse's children, and being involved in your children's lives is more than enough to convince nearly everyone that you are a good individual. But because of the special role lawyers play in society and the power their unique knowledge provides them, lawyers are held to a higher standard.

In addition, the repute, in the public eye, of a profession that dispenses and protects justice can be harmed by letting a person with criminal acts in their past enter that profession. To protect against any such disrepute and the harm such individuals might wreck on the public, it makes sense to require them to show a proportionate amount of positive good acts. In this context, the court's balancing test can only be seen as a test of good group moral character.

VI. ARIZONA IS NOT ALONE IN ITS CONFUSION

The Arizona Supreme Court is not alone in its confusion. Many other courts require good group moral character and

123. *Id.* at 883 (noting that "King's misconduct tips the scales against admission at the outset").

124. *See, e.g., id.* at 885 ("The mere passage of time without incident is insufficient standing alone").

125. *Id.* at 883 ("King's misconduct tips the scales against admission at the outset, thereby requiring him to produce an extraordinary amount or quality of evidence to meet his burden of proof").

apply a balancing test for good group moral character without realizing they are doing so.

A. In re Hinson-Lyles

For example, we find echoes of the *King* decision in the Louisiana Supreme Court opinion *In re Hinson-Lyles*.[126] Hinson-Lyles "was convicted of a felony sexual offense in 1999"[127] for having sexual relations with one of her underage students.[128] In 2003, after a character and fitness hearing, the Commissioner recommended that Hinson-Lyles be conditionally admitted to the practice of law.[129]

In a relatively short opinion, the court denied her admission without discussing any evidence relating to Hinson-Lyles' current moral behavior.[130] The concurrence, on the other hand, took care to note that there was considerable evidence that Hinson-Lyles never denied responsibility for her acts, led a morally good life before committing this crime, was a model probationer, was remorseful, and understood she had done wrong.[131] In addition, there was evidence from a psychologist identifying the cause of her conduct and that she would not re-offend. [132] Finally, "[s]he is now married, expecting a child, and by all accounts available, is functioning as a normal young married professional." [133]

With our analysis of the Arizona cases in hand, we can see that the majority avoided discussing these bits of evidence in favor of Hinson-Lyles because it felt compelled to reject her admission, but did not know why. While there was considerable evidence that Hinson-Lyles was living a normal life and that she had present good individual character, she provided no evidence to support her having good group moral character.

The court implicitly recognized the importance of good group moral character when it noted that good moral character requires "observances of fiduciary responsibility."[134]

126. *In re* Hinson-Lyles, 864 So. 2d 108 (La. 2004).
127. *Id. at* 109-10.
128. *Id.* at 110-11.
129. *Id.*
130. *Id.* at 111-12.
131. *Id.* at 113 (Weimer, J., concurring).
132. *Hinson-Lyles*, 864 So. 2d at 113 (Weimer, J. concurring).
133. *Id.*
134. *Id.* at 111 (defining "good moral character" to include candor and

Fiduciary duties are duties that arise out of one's position of trust—precisely the position that a person undertakes when they join a state bar (the group). Thus, the court recognized, albeit unconsciously, that Hinson-Lyles must present evidence that she can conform to the heightened moral qualifications of a group. The implicit importance of evidence of group moral character was reinforced when the court pointed to the evidence of Hinson-Lyles' failure to do exactly that when she was a teacher, occupying a position of trust with requisite duties beyond that of non-teachers.[135]

Unfortunately, as in the *King* decision, the court in *Hinson-Lyles* never directly explained its underlying reason for denying Hinson-Lyles admission.

B. In re Dortch

Dortch conspired with six people to rob a bank in order to provide an infusion of cash for his failing business.[136] In the course of the robbery, Dortch's accomplice shot and killed a police officer.[137] Dortch eventually pled "guilty to second-degree murder, attempted armed robbery and conspiracy" and served fifteen years.[138] As in *Arrotta*, *Hamm*, *King*, and *Hinson-Lyles*, the District of Columbia Court of Appeals implicitly recognized and relied upon good group moral character to deny Dortch admission.[139]

For example, the decision acknowledged that Dortch had present good individual moral character: "Dortch has been a law-abiding citizen and lived a constructive life since his release from prison,"[140] was a model prisoner, became active in his church, graduated from law school,[141] "was awarded the Dean's Cup for outstanding community service," [142] "served as

"observances of fiduciary responsibility").

135. *Id.* at 112.

136. *In re* Dortch, 860 A.2d 346, 349 (D.C. 2004).

137. *Id.*

138. *Id.* at 350.

139. *Id.* at 348. Importantly, the court also relies on the fact that Dortch is still on parole to refuse to grant him admission. *Id.* at 362 ("We conclude that so long as Dortch is on parole, he cannot demonstrate by clear and convincing evidence that he is fit to assume the responsibilities and be accorded the privileges of an officer of the court.").

140. *Id.* at 351.

141. *Id.* at 350-51.

142. *Dortch*, 860 A.2d at 351.

an adjunct professor at the law school,"[143] worked as a paralegal, and became director of "a diversion program for first-time juvenile offenders."[144]

But Dortch faced precisely the same problem found in each of the opinions discussed thus far. He presented no evidence of good group moral character. We must conclude that this lack of evidence was vital to the court's decision because the court rejected Dortch even though it listed the evidence establishing that he had present good individual moral character.[145]

In addition, the court undertook a discussion of moral character that fundamentally (and implicitly) relied upon notions of group moral character. For example, the court focused on the importance of the group's (the state bar's) perspective in assessing Dortch's character when it stated, "it is appropriate to consider the public perception of and confidence in the bar when determining the fitness of original applicants to practice law."[146] The court specifically noted that such a perspective is built into the District of Columbia's bar rules which require "that an attorney who has been disbarred on account of misconduct and who seeks to be reinstated must prove . . . '[t]hat the resumption of the practice of law by the attorney will not be detrimental to the integrity and standing of the Bar, or to the administration of justice, or subversive to the public interest.'"[147] Thus, the court unconsciously recognized that the group (the state bar) had a right, and perhaps even a duty, to impose additional (group) moral qualifications on its members.

We also see group moral character in the court's acceptance of New Jersey's balancing test for moral character.[148] That this balancing test pertains to *group* moral character is made clear when the court noted that it applies to "the applicant's burden to dispel the concern that his or her admission to practice law . . . will [not] be detrimental to the

143. *Id.*

144. *Id.*

145. *See id.* at 360.

146. *Id.* at 355 (alteration in original) (quoting *In re* Prager, 661 N.E.2d 84, 90 (Mass. 1996)).

147. *Id.* (quoting D.C. BAR R. XI, § 16(d)(2)).

148. *See Dortch*, 860 A.2d at 357 (accepting New Jersey's view "that '[t]he more serious the misconduct, the greater the showing of rehabilitation that will be required") (quoting *In re* Manville, 538 A.2d 1128, 1134 n.7 (D.C. 1988)).

integrity and standing of the Bar."[149]

Furthermore, in assessing this balancing test the court observed that "[m]erely showing that an individual is now living as and doing those things he or she should have done through life . . . does not prove that the individual has undertaken a useful and constructive place in society."[150] In essence, the court of appeals agreed with Arizona's Supreme Court that *merely* living a good, ordinary life does not offset one's bad acts for the purposes of assessing group moral character.

C. In re Krule

We can also see that the Illinois Supreme Court implicitly accepted group morality when it denied Jerome Krule admission to the Illinois bar.[151] In addition to providing an example of another court that is confused about moral character,[152] the *Krule* decision also brings the balancing test into sharper focus and presents a clear instance of judicial recognition of the problem found in *Arrotta*, *Hamm*, *King*, *Hinson-Lyles*, and *Dortsch*.

The Illinois Supreme Court adopted a balancing test,[153] but noted that not all positive good acts, outside of the scope of living a normal life, matter. Rather, an applicant needs to demonstrate kind of good acts that are predictive of how an applicant would act when the applicant was independent of supervision and had to exercise the applicant's own judgment.[154]

In addition, the *Krule* decision provided a rare example of judicial recognition of the problem expressed in this Article

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149. *Id.*

150. *Id.* at 360 (quoting *In re* Cason, 294 S.E.2d 520, 522-23 (Ga. 1982)).

151. *In re* Krule, 741 N.E.2d 259, 260 (Ill. 2000).

152. We can tell that Krule was denied admission largely on the basis of his group moral character from the court's emphasis on the fact that Krule committed his crime when he was "a licensed professional," and that "his criminal scheme arose in the context of circumstances comparable to those with which he would be faced as an attorney, evincing an inability on Krule's part to *carry out his professional responsibilities* honestly." *Id.* at 264 (emphasis added).

153. *See id.* at 263-64 (noting that "community service and achievements" are used to assess an applicant's good moral character and that "the positive aspects of Krule's application were still outweighed by the nature and gravity of the criminal offense for which he had been convicted").

154. *Id.* at 264.

when Justice McMorrow stated:

> As I studied and pondered the majority opinion, one lingering question always remained: What more could petitioner have done that he did not already do to enable him to be allowed the privilege to practice law? Stated otherwise, is there anything petitioner failed to do to justify refusing him a license to practice law. The majority does not answer this essential question.[155]

In essence, Justice McMorrow recognized that Krule should not be granted admission, but does not see an explanation for why he should not be granted admission.

We know that Krule should not have been admitted because he lacked evidence of good group moral character, but the court could not say so because it only implicitly understood the importance of group moral character.

VII. MAKING THE IMPLICIT EXPLICIT

Applicants to the bar are judged on two bases: good individual moral character and good group moral character. Thus far, state supreme courts have implicitly understood this, have applied this dual standard to deny membership to people with no evidence of good group moral character, but have only obliquely explained what they were doing. This is manifestly unfair and unjust. It is made all the more unjust because of its disparate impact on people with criminal pasts, non-whites, and men.

Repairing this injustice is simple. The courts must make the implicit explicit and bring their decisions in line with three thousand years of ethical theory. The courts must explain clearly and explicitly that an applicant with a criminal past must show both that he or she is a good individual and the type of person who should be offered membership in a special group.

155. *Id.* at 267 (McMorrow, J., concurring).

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